CONFRONTATION AND HEARSAY AFTER CRAWFORD AND DAVIS

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Introduction

Hornbook point is that *Crawford* displaced the old *Roberts* approached, somewhat in the manner that *Daubert* displaced the old *Frye* standard.

- *Crawford* largely buried *Roberts* (as *Daubert* largely buried *Frye*), but the older standards seemed to live on
- *Frye's* "general acceptance" standard still counts, and the *Roberts* trustworthiness counts for nontestimonial hearsay
- Both of the newer cases, however, mark new departures, as *Daubert* asks courts to confront science directly (not hide behind the opinions of experts) and *Crawford* asks courts to use Confrontation a bit like the other procedural protections in the Fourth, Fifth, and Sixth Amendments

But *does* the *Roberts* standard survive? At the end of this outline, I return to the question whether *Crawford* has buried and destroyed *Roberts,* and the question whether doing this thing would be good or bad.

I. What is *Crawford* doing to Confrontation and Hearsay? For testimonial statements, *Crawford* throws out the reliability standard and asks the question whether a statement is "testimonial." There seem to be three underlying purposes or policies behind this criterion:

A. *Original understanding.* One clear purpose in *Crawford,* which is unsurprising in an opinion spearheaded by Justice Scalia, is to do something closer to the original meaning (a historical query). The confrontation clause was aimed at the procedures adopted during Queen Mary's reign (1553-1558), which was an era of religious persecution of protestants. Those "Marian statutes" enabled magistrates to examine witnesses and report results, and *these* reports became the basis for convictions. So part of what *Crawford* does is return to the original meaning of the Confrontation Clause.

B. *Functional approach.* A second purpose of *Crawford* was to move toward a more "functional" approach. One reason for this move is that reliability analysis under *Roberts* is thought to be bankrupt, and must

be abandoned. Another is that confrontation is a procedural matter, not a matter of implementing hearsay law.

1. One objection to this sweeping condemnation of reliability analysis is that it also threatens to undermine the whole hearsay doctrine. If we can't *reliably* analyze the factors that bear on "reliability," how can we *reliably* apply such things as the catchall exception?
2. This condemnation also calls into question the categorical exceptions, undermining them to some extent because overall reliability lies behind most of the specific criteria, and it is impossible to apply the criteria sensibly if reliability is not the aim that lies consciously in the mind of the lawyer or judge in applying those factors.

C. Regulatory aim. Also behind *Crawford* is a regulatory or prophylactic purpose. Like the exclusionary doctrines under the Fourth, Fifth, and Sixth Amendments (associated with the decisions in *Mapp, Miranda,* and *Massiah*), which regulate the conduct of police by requiring exclusion of evidence when they violate rights, now the Confrontation Clause of the Sixth Amendment regulates *prosecutorial* conduct (and maybe to some extent police conduct as well) by forcing police and prosecutors to get *live witnesses* rather than investigative statements, in order to try criminal offenses. The idea is not so much to penalize misconduct, however, as to force a different kind of trial and preparation for trial.

II. What Is a Testimonial Statement? Four somewhat overlapping factors help answer this question: First is the mental state of the speaker. Second is the conduct of law enforcement officers. Third is the nature of the statement. Fourth are the formalities or lack of them that surround the making of the statement.

A. Mental state of speaker: The "expectations" standard. Recall that the academic "father" of this approach is Professor Richard Friedman of Michigan, who has argued tirelessly that the way to identify testimonial statements is to ask about the expectations of the speaker. Why should *the speaker's* "expectations" count?

1. One positive reason is that the expectations of the speaker provide a good indicator of the way that the statement *functions in the system.* If the speaker expects (or understands or intends) that his statement will function as investigative fodder in connection with a crime, it probably will function in that way. If he expects (or understands or intends) that his statement will serve *as evidence,* that is a pretty good indication at least that the statement *can* function in that way. *Crawford* says that testifying means "bearing testimony" and that verb appears to refer to the speaker, and seems to include not only what he *does* but what he *thinks.*

2. If we did not pay any attention to the intent of the speaker, we would be taking a step toward the position that essentially *all* hearsay that could be offered in case must be testimonial for purposes of confrontation. That would probably sweep too broadly. We probably do *not,* for example, want to include as testimonial a hotel registration or invoice (or a reflection of the charge on a bill to the cardholder). Nor do we want a rental car record, offered to prove the whereabouts of the accused at an particular point in time, to be viewed as testimonial. One good way to get there is to say that the expectations of the speaker in these cases do not include using the entries in investigating or prosecuting crime.
3. At the opposite extreme, a very rigorous or "hard" standard turning on *purpose or intent* (as opposed to expectations) would help too much hearsay to escape the category of testimonial, so a somewhat *softer* standard seems preferable to a "harder" standard. One who talks to police, for example, might be *mainly* trying to help himself, or might be talking just to get out from under police pressure, or might actually be trying to exonerate the defendant rather than incriminate him. These statements probably should be viewed as testimonial, but they would not be testimonial if the standard required *intent* or *purpose. Hence* a "softer" expectation seems better, and allows for the result that such statements are testimonial.
4. A practical reason to prefer the softer standard is that it is easier to administer. Because "expectations" are broader and more general, one can more easily estimate them and assess them than one can estimate or assess the purpose or intent of a speaker.
5. *Crawford* is elusive on this point. *Crawford* does refer to a definition of testimonial that turns on what an "objective witness" would "reasonably believe" about the statement, but this reference is tantalizingly vague. It isn't absolutely certain that the "objective witness" is the speaker, or some effigy of the speaker ("a reasonable person in the speaker's position"). But in theory that reference might refer to someone else ("an informed outsider," perhaps), who might be a lawyer or a judge who would both be in a better position than "a reasonable person in the speaker's position" to decide whether the statement should be viewed as testimonial. Presumably it would invite simply a functional analysis asking whether the statement looks like the kind of thing that would normally be presented at a trial in the form of testimony. It is hard to imagine that the Court meant any such thing, and probably "objective witness" means "a reasonable person in the speaker's

position," which takes us to the speaker's mindset, reasonably approximated.

6. *Davis* is also elusive on this point. *Davis* does refer to the speaker's purpose in the Washington case under review – saying that "she was seeking aid, not telling a story about the past," which once again seems to refer to her state of mind, whether we call it "purpose" or "expectation." But *Davis* also refers to "the purpose of the interrogation," which *sounds like* an allusion to the purpose of the persons putting the questions – in other words the *police*, since interrogations are by their nature exchanges in which the more active or leading party are police, not the witness being interviewed.

B. Behavior of law enforcement. The academic father of this approach thinks that the behavior of law enforcement officers does not count in the calculus, but pretty clearly the cases disagree on this point.

1. *Crawford* refers repeatedly to police "interrogations," and notes that the involvement of the government in producing statements "presents unique potential for prosecutorial abuse." And again *Davis* speaks of "the purpose of the interrogation," which seems an *indirect* reference to the purposes of police.
2. Focusing on police conduct is useful because it comports with what seems to have been the historical concern, which was the use of magistrates in fashioning or creating statements in pretrial proceedings.
3. Focusing on police conduct is also useful because it comports with what seems to be the prophylactic purpose of the newly emerging doctrine in having an impact on *how* police and prosecutors *prepare for trial.* Taking statements is of course fine, but it is not the statements that are to be the evidence if the case is tried. Rather it is the later testimony of the same speakers who made the statements, and who presumably will repeat at trial what they said before.
4. Active involvement of police in *eliciting* statements increases the likelihood that they should be viewed as testimonial. The references to "interrogation" in both *Crawford* and *Davis* suggest as much. A good reason to count this factor is that this kind of behavior helps show how the statement functions in the system. Like the expectations of the speaker, the *purpose* or *intent* of law enforcement in taking the statements is a good sign of the function that those statements are serving in investigating a case or preparing for trial.
5. Where the purpose of police is to deal with an ongoing emergency, *Davis* teaches that statements elicited in this setting are nontestimonial. The difference between the Washington case, where the 911 call to the operator reporting domestic abuse was considered

nontestimonial, and the Indiana case, where the police on-the-scene interview was viewed as testimonial, is that in the latter case *the police purpose* was to investigate a crime: *Davis* said that "the interrogation was part of an investigation into possibly criminal past conduct," citing as proof of this point the statement by the investigating officer, who "expressly acknowledged" that purpose.

6. Involvement by law enforcement officers in *eliciting* statements, however, is not always dispositive. One example: Thus statements elicited by undercover agents from conspirators usually fit the coconspirator exception in FRE 801(d)(2)(E) and should be admissible as nontestimonial hearsay (*Crawford* says such statements are nontestimonial). Another example: Incoming drug calls received by police or DEA Agents conducting a raid should continue to be admissible as nontestimonial. Actually these are often viewed as nonhearsay because they represent *attempts to purchase drugs* and their *performative aspect* justifies nonhearsay treatment: If a person uses words to try to make a purchase, he is not just *talking about it,* but *actually trying* to make a purchase, which justifies nonhearsay treatment eve when we take those words as proof of what the purchaser wants to do and as some indication that the person he is talking to deals drugs. In both cases, it should suffice that the statements are part of ongoing criminality, and official involvement in this process, if it is bad or evil, can be handled (or disciplined) by means of entrapment doctrines.
7. Behavior by law enforcement officers in *eliciting* statements also should not be *required:* As the Court pointed out in *Crawford*, at least some of the statements offered against Raleigh were volunteered rather than elicited, and a purpose in the mind of the speaker to make evidence against the accused should suffice even if public agents do nothing to encourage this kind of reporting.

C. The privacy factor. Very nearly *every* reported case since *Crawford* has concluded that statements in purely private settings are not testimonial. Again the academic father of the new doctrine disagrees: He argues that *if* private statements are nontestimonial, *then* witnesses will have an easy of avoiding the stand. They will just speak to friends and ask that the statements be passed along, or victim rights organizations would systematically gather such statements. Other pioneers in this area disagree, and take the opposite course.

1. What most cases say is that private party statements are not testimonial because the speaker would not understand or expect that what he says would be used for investigating crimes or preparing for trial. See U.S. v. Franklin, 415 F.3d 537, 545 (6th Cir. 2005) (codefendant's statement saying "we hit a truck," referring to

defendant and made to friend and confidant "by happenstance," was not testimonial); State v. Staten, 610 S.E.2d 823 (S.C. 2005) (murder victim's statement to friend that defendant threatened him with gun was nontestimonial; objective witness would not think statement would be available for later use at trial).

2. Sometimes these statements are excited utterances offered under that exception, and many early decisions took the view that the stress of excitement meant that statements could not be testimonial. See State v. Lewis, 619 S.E.2d 830 (N.C. 2005) (statements by victim of assault/robbery to police were not testimonial; neighbors reported disturbance, and victim did not seek to talk to officer; victim would not have thought statements would be used in trial). As *Davis* illustrates, however, the Court does *not* think that excitement removes a statement from the testimonial category. Modern decisions are beginning to get this message. See Odemns v. U.S., 2006 WL 1697178 (D.C. Cir. 2006) (error to admit excited utterance by victim in second robbery identifying defendant who had been arrested, offered in trial of defendant for another robbery; although excited, statement was testimonial) (reversing).
3. Sometimes these statements are made in what amount to emergency situations in which a victim is seeking help, and it appears that the *Davis* emergency doctrine can apply here, even though police are not involved. See State v. Mechling, 2006 WL 1805697 (W.Va. 2006) (woman's statements to neighbor during domestic battery might be nontestimonial to the extent that neighbor "was intervening to address an emergency").
4. The nature of the speaker and the nature of the statement count in this connection. If the speaker is a crime victim, what he says is more likely to be testimonial, even if said in a private setting, simply because the victim is more likely to expect (or even intend) that his statement will lead to action, to investigation and prosecution. If the statement describes what is obviously a crime, again it is more likely to be testimonial, and for the same reason – that the speaker is more likely to expect (even intend) that the statement lead to action, meaning investigation and prosecution. A very few cases have recognized this possibility. See State v. Shafer, 128 P.3d 87, 95 (Wash. 2006) (dissent argues that statement to "private individual" may be testimonial, citing parent, teacher, or doctor who suspects child abuse and questions child to confirm suspicions); In re E.H. v. E.H., 823 N.E.2d 1029, 1035 (Ill. App. 2005) (child's statement to grandmother alleging sexual assault were testimonial), appeal allowed, 833 N.E.2d 295 (2005).

D. Formalities or the lack of them. *Crawford* said that one who "makes a formal statement to government officers bears testimony" in way that differs from "a casual remark to an acquaintance," and added that the confrontation clause "reflects an especially acute concern" with this type of statement. The Court also referred in *Crawford* to "formalized testimonial materials, such as affidavits, custodial examinations," and "prior testimony."

1. The "formalities" test became the basis in many early post-*Crawford* decisions for concluding that statements were *not* testimonial, including statements to police describing criminal acts. See State v. Lewis, 619 S.E.2d 830 (N.C. 2005) (structured interrogation is key factor; during preliminary factfinding, statements by victim of robbery and assault to police officer were not testimonial; neighbors reported disturbance, and victim did not seek to talk to officer; victim would not have thought statements would be used in trial).
2. Pretty clearly the test operates more reliability as a test of "inclusion" rather than as the other way around. If such formalities *are* found, the statement is likely to be testimonial, but the *absence* of such formalities does little to put a statement outside the testimonial category.

III. Problem Areas. Here are eight major problem areas arising in the setting of *Crawford* and some suggestions for approaching them.

A. Private statements. Present indications are that these are not testimonial, and two prominent commentators have argued in favor of this result (Amar and Mosteller).

1. A good example arose in North Carolina, where an assault victim made an excited utterance en route to the hospital, describing to her friend what had happened to her. See State v. Lawson, 619 S.E.2d 410, 413 (N.C. 2005) (she was not likely "thinking in terms of anything outside the scope of their private conversation"). See also U.S. v. Brown, 441 F.3d 1330, 1359 (11th Cir. 2006) (witness described hearing defendant's mother say on phone, "you didn't kill that lady, no," which was excited utterance; private phone conversation between mother and son, while she was at dining room table with family, is not testimonial).
2. An argument favoring this outcome is that an important role of the clause is in disciplining police and prosecutors in the ways they prepare for trial, and the greatest possibility for affecting their conduct is to exclude statements that they produce. The point is not to keep them from gathering such statements, any more than the point of the hearsay doctrine is to dissuade lawyers from gathering

pretrial statements in preparing a case. Rather, the point is simply to bring home that these statements are not to be used at trial.

3. Another argument favoring this outcome is that the speaker *usually* does not expect such statements to play a role in investigating or preparing a case, as the court commented in *Lawson,* supra.
4. While the overwhelming majority of cases come out this way, at least so far, there are a few cases noting the Friedman argument that at least some such statements might be testimonial, particularly statements in which victims describe crimes to people who are likely to go to the police with the story. See In re E.H. v. E.H., 823 N.E.2d 1029, 1035 (Ill. App. 2005) (child's statement to grandmother alleging sexual assault were testimonial), appeal allowed, 833 N.E.2d 295 (2005).

B. Child Victim Statements. Many child victim statements are now excludable, including especially those that are "testimonial" because they are taken in the form of depositions, but also those that

1. Child victim hearsay statutes typically pave the way for statements describing abuse, sometimes requiring corroboration or unavailability of the child at trial, and sometimes allowing formal depositions. Clearly children's statements describing abuse after the fact to police or social service investigators are testimonial under *Crawford. See* Flores v. State, 120 P.3d 1170, 1178 (Nev. 2005) (child's statement to police investigator describing abuse that killed another child was testimonial) (reversing); Snowden v. State, 846 A.2d 36, 47 (Md. 2004) (error to admit child's statements to social worker describing abuse, offered under tender years exception; these were testimonial; child did not testify) (reversing).
2. Most courts hold that statements to *doctors* or *clinicians* examining the child to determine whether abuse occurred are *not* testimonial, despite the fact that doctors have reporting requirements and often police or social service people are at hand, if not actually in the room. See State v. Vigil, 127 P.3d 916, 925 (Colo. 2006) (7 year old victim talking to doctor would "reasonably be interested in feeling better," would expect doctor to use statements to make diagnosis, would not foresee use at trial).
3. Most courts hold that statements to guardians or family members describing abuse are not testimonial. See Hobgood v. State, 926 So.2d 847, 851 (Miss. 2006) (admitting statements by 5-year-old child describing abuse, made to babysitter, grandmother, psychotherapist, and pediatrician under tender years exception; not testimonial; purposes was to secure wellbeing of child, not further prosecution).

4. To the extent that *police involvement* in eliciting statements counts in the calculus, it seems that active questioning of a child counts heavily toward finding that a statement is testimonial.
5. Arguably, however, statements by the very youngest children, such as those in the age range of two to four years, simply *cannot be* testimonial because such children cannot comprehend sex or criminality or prosecutions. In situations such as this one, the real question becomes whether police or official involvement, *by itself,* can make a statement describing a crime into a testimonial statement. Arguably the answer should be Yes, for the same reason that police involvement makes statements testimonial when private persons speak to police without purposefully making evidence (to get off the hook themselves, or even in the hope that nothing will come of what they say).
6. It seems that *Crawford* did not disturb or discard the principles articulated in *Craig* allowing remote testimony if the ordeal of testifying in the courtroom would be too much for the child, on the basis of particularized findings.

C. Lab Reports. Lab reports covering everything from fingerprints and DNA to blood alcohol content are routinely offered in criminal cases. The question has long been bedeviled by both hearsay and constitutional problems.

1. Hearsay issues (public and business records): Must lab reports be offered as public records, or can they be admitted as business records? Cases continue to split on this point. *If* they must be offered as public records, FRE 803(8) puts up three hurdles. Hurdle 1: Clause B excludes "matters observed" by police or law enforcement, so *one* issue is whether technicians count as "law enforcement" agents. A landmark decision in the *Oates* case held that lab technicians *are* law enforcement agents. See U.S. v. Oates, 560 F.2d 45 (2d Cir. 1977). Hurdle 2: Clause C covering "factual findings" can only be invoked *by the accused* in criminal cases. *Oates* said this clause applies. Hurdle 3: *If* lab reports are public records, *can* you go to some other exception? *Oates* said No.
2. Hearsay issues (special statutes): They generally allow the prosecutor to offer lab reports but also allow the defense either (a) to force the prosecutor to call the technician and offer his testimony in lieu of or along with the report, or (b) to subpoena the technician himself. A statute of the former kind seems adequate to protect confrontation rights, but a statute of the latter kind does not because *burdening the defense* with the obligation to call and adduce testimony is simply an illusory opportunity, and is not at all similar to *forcing the prosecutor* to call the technician and letting the defense cross-

examine. But some modern decisions uphold even statutes of the latter sort: See State v. Campbell, 2006 WL 2074742 (N.D. 2006) (sufficient under *Crawford* that defense could subpoena preparer; by not doing so, defense waived objection); State v. Smith, 2006 WL 846342 (Ohio 2006) (statute is constitutional under *Crawford;* defense waived confrontation rights by not calling preparer).

3. Confrontation issues: *Crawford* mentioned business records as an example of nontestimonial hearsay. It seems incredible, however, to imagine that this comment can translate into admitting lab reports as nontestimonial material. Lab reports are prepared by public officials for the specific purpose of making evidence to convict defendants. If lab reports are not testimonial, it opens up a huge hole in the coverage of the clause. *Compare* People v. Lonsby, 707 N.W.2d 610, 619 (Mich. 2005) (error to admit crime lab serologist's report identifying substance on defendant's swimming trunks as semen; report was testimonial) (reversing) *with* State v. Forte, 629 S.E.2d 137, 142 (N.C. 2006) (admitting state crime lab DNA report linking defendant to murder; report was nontestimonial because it related to "routine, nonadversarial matters").
4. Limited use: Post-*Crawford* cases allow somewhat limited use of certificates and affidavits to prove such things as the calibration of the machine or the qualifications of the operator. See Bohsancurt v. Eisenberg, 129 P.3d 471, 475 (Ariz. App. 2006) (maintenance and calibration records for breath-testing machine were not testimonial under *Crawford*). Arguably *more generalized* lab reports should be admissible as well. See U.S. v. Scholle, 553 F.2d 1109, 1124-1125, 1 Fed.R.Evid.Serv. 1374 (8th Cir. 1977) (printouts on drugs seized across country, including lab analyses), cert. denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300.

D. Against Interest Statements. This exception, expanded to reach statements against penal interest when the Rules came into effect in 1975, has proved more helpful to prosecutors than defendants. It was expected that defendants would offer third-party confessions to get off the hook. Instead, prosecutors have offered statements by co-offenders implicating defendants.

1. The Supreme Court held in *Williamson* that FRE 804(b)(3) reaches only statements that are *themselves* against interest, but the same opinion acknowledged that statements like "Sam and I went to Joe's house" could be against interest. *Williamson* did not address constitutional issues and did not end use of against-interest statements implicating the accused. *Lillie* addressed the same issue a few years later in a review of a state case and *did* address constitutional issues, but the Court fractured, and even *this* opinion

did not end use of against-interest statements implicating defendants.

2. In light of these forays into the field, which have to be counted as failures in leaving huge uncertainty and conflict, prosecutors continued to offer against-interest statements, including those given to police, and even those given in formal testimony in proceedings.
3. *Crawford* clearly cut through this morass, and put an end to the use of *all* against-interest statements offered against defendants when given to police or in proceedings.
4. *Crawford* did not, however, necessarily determine the admissibility of against-interest statements made in purely private settings. See U.S. v. Johnson, 440 F.3d 832, 843 (6th Cir. 2006) (statements by co-offender to informant, admitted as against interest, were not testimonial because declarant was "unaware that his conversations were being recorded" and reasonable person would not anticipate use in investigation or prosecution).

E. Scope of the Emergency Doctrine. Apparently *Davis* intended to create a *very narrow* exception to the testimonial category. In *Davis,* which was the Washington case on review, the Court approved the 911 call because the woman making the call was apparently in danger and the focus of the call was to describe the situation before help had arrived. In *Hammon,* which was the Indiana case, the woman had been separated from the alleged abuser physically and the Court thought the emergency was over.

1. The Court distinguished the two situations thus: In the emergency setting, the call looked forward toward figuring out a way to help, while in the other case the conversation looked backward toward figuring out what had happened.
2. The signal here is that the emergency doctrine is narrow: Plainly the danger for the woman was *not* immediate in the *Davis* case because the assailant had left, but obviously the danger was ongoing because the assailant had not yet been apprehended and might return. Plainly the danger in the *Hammon* case was not completely over because the man had not been arrested, and might not have been incarcerated even if he was arrested. Apparently the assumption in *Hammon* was that the man would be restrained momentarily at least, and would be directed to stay away from the woman.
3. The emergency doctrine has been applied in private settings as well. See State v. Mechling, 2006 WL 1805697 (W.Va. 2006) (woman's statements to neighbor during domestic battery might be nontestimonial to the extent that neighbor "was intervening to address an emergency").

4. There is force in Justice Thomas dissent in *Davis* that the Court's approach "yields no predictable results" because it is very hard to distinguish clearly between "forward-looking" statements designed to deal with an emergency and "backward-looking" statements seeking to figure out what happened, and it seems true (as Thomas argues) that the police in both *Davis* and *Hammon* had in mind *both* dealing with an emergency *and* bringing charges. In the *Hammon* case where the statement was testimonial, it seems that the police were trying to determine, among other things, whether the husband "constituted a continuing danger," which sounds like dealing with an emergency. And in the *Davis* case where the statement was deemed nontestimonial, it seems likely that the police were in fact gathering "information for prosecution."

F. The Waiver Shortcut. Everyone understands that confrontation rights are waived by failure to raise them at the critical time. An obvious form of waiver that arises in the *Crawford* cases is failing to ask or to pursue the statements that are offered at trial. Other forms of waiver promise to be more controversial:

1. Some authority holds that if a question is asked and the witness refuses to answer or does not answer in a satisfactory manner, the defense waives *Crawford* objections by failing to seek a court order directing the witness to answer. See Fowler v. State, 829 N.E.2d 459, 467 (Ind. 2005) (in trial for domestic battery where wife refused to testify without claiming privilege, defense waived confrontation rights by not pressing for ruling requiring her to answer).
2. Suppose the speaker is available (under subpoena or even present in court, or even simply within *reach* of subpoena), and the defendant does not call or summon the witness. Can *that* waive confrontation rights? See Commonwealth v. Meeks, 2006 WL 1649316 (Ky. 2006) (in joint trial of M and P, admitting M's confession implicating P; M waived privilege against self-incrimination and agreed to testify, and P waived confrontation rights by not calling M).
3. The notion that an *opportunity to call* a witness at trial satisfies the clause should be rejected, as several courts have already done. The reason is that defendants *cannot* realistically call witnesses whose out-of-court statements have been offered, because they cannot be seen to call a witness and then attempt to destroy his credibility, and the so-called opportunity to do so is an illusory one that deprives the defendant of any realistic right to confront the witness while shifting away from the prosecutor the burden of having to call the witness. See State v. Cox, 876 So.2d 932 (La. App. 2004) (rejecting claim that confrontation rights were satisfied where court offered defense "the right to subpoena Sykes as a witness," which

"begs the issue" because calling her as a witness "would hardly render the statement admissible" and defendant "should not be required to call Mrs. Sykes as a witness simply to facilitate the State's introduction of evidence," as there might be "a whole host of reasons" why defendant would not want to call her; if the state wanted to introduce her statement, it could have called her); Bratton v. State, 156 S.W.3d 689, 694 (Tex. App. 2005) (prosecutor must call witness or prove that he was previously subject to cross-examination; defense failure to call witness does not waive confrontation claims).

G. The Declarant Who Can Be Cross-Examined. Crawford is at pains to say that statements by a witness who was *previously* cross-examined, and statements by a witness who can be *cross-examined at trial,* can be admitted.

1. Prior Cross Generally: Obviously the most important category of hearsay reached by this exception to *Crawford* is former testimony given in a trial or preliminary hearing or deposition where the defense did cross-examine the witness. If the witness is unavailable, such testimony can be admitted under FRE 804(b)(1), if *Crawford* allows.
2. Prior Cross Issue 1: What if the defense had *a chance* to cross-examine in the prior deposition, but did not? This is the truly hard issue raised in *Roberts,* and never really resolved. Could easily say defendant should have cross-examined, bore risk that speaker would disappear. But *most defense lawyers* think the risk of playing their hand early outweighs the small chance that something will happen to the witness before trial. And cross-examination is supposed to be a *trial right,* not something that must be exercised, if at all, at the first opportunity.
3. Prior Cross Issue 2: Does the chance to cross-examine before cover *also* statements made at other times? Suppose the witness told police "defendant took me to the bank, and I went in while he parked, and later he came in and covered me while I stuck up the teller." Suppose the witness testifies at the preliminary hearing, but no mention is made of this statement, and the defendant cross-examines. Does the fact that this cross-examination occurred justify admitting the preliminary hearing testimony *and also* the statement to police?
4. Later Cross: Pre-*Crawford* cases indicate that even an uncooperative and unremembering witness can be cross-examinable. The Supreme Court has repeatedly approved cross-examination at trial as satisfying confrontation concerns. In *Green* in 1970, in *O'Neil* in 1971, in *Owens* in 1982, and of course similar language is repeated

in *Crawford* itself in 2004. In *Green,* however, the Court remanded the case to the California Supreme Court to consider the question whether the fact that Melvin Porter said his "remembry" was bad about the events of the case stifled cross-examination so that the chance at trial to cross-examine was not good enough (on remand the California Supreme Court found that the opportunity was good enough). In *Owens,* the Court said that even though the witness could not remember who had hit him (he was a guard sent to the hospital by a prison beating), and could just barely remember giving the statement in the hospital, *that* was good enough, and the confrontation clause was satisfied. The most powerful statement comes in the *Fensterer* case, where the Court says that the defendant is *not* entitled to cross "that is effective in whatever way, and to whatever extent, the defense might wish."

5. Even though the cases so strongly point toward the conclusion that essentially *any* cross-examination suffices to satisfy confrontation concerns, there are a few straws in the wind: Errors in blocking cross-examination on crucial points can deprive the defense of an adequate opportunity, as can claims of privilege that block testing. And there should be *at least* some memory of *either* the event reported *or* the statement given in order for the opportunity to cross-examine to be adequate.

H. Farewell *Roberts?* Does *Roberts* surviv, or did Justice Scalia succeed in burying it? There is the matter of the scathing critique in *Crawford:* Can courts really keep applying a standard that has been butchered in the way that *Crawford* butchered *Roberts?* There is the Delphic remark in *Davis,* saying that *Crawford* gets "not merely" to the "core" of confrontation, but also marks "its perimeter." There is also the comment in *Davis* that *Crawford* had "overruled" *Roberts."* My own view is that *Roberts* remains good law until the Court holds that it is not, and the Court has not done so yet. But instead of arguing the question whether *Roberts* was killed by the comments in *Crawford* and *Davis,* let's talk about the advantages and drawbacks of going forward without *Roberts.*

1. A good thing: Getting rid of a logical tangle. One advantage to discarding *Roberts* is that we no longer have two separate and apparently different reliability standards. It never made a great deal of sense to analyze hearsay once for purposes of deciding that it was reliable enough to satisfy a catchall or categorical exception, and then a second time applying a separate-but-different-but-seemingly-equivalent reliability standard based on confrontation.
2. Another good thing: Forcing or inviting courts to take the hearsay doctrine more seriously. Very nearly the same analysis is possible

under the hearsay doctrine, and taking it more seriously as a guardian of rights might be a good thing.

3. Another good thing: Clarifying the law. It seems very likely, despite some difficulties, that *Crawford* will produce a clearer doctrinal picture than *Roberts* did. We can expect soon to have answers to the question whether private statements can be testimonial, and we have achieved great clarity already with respect to "actually testimonial" statements (like plea allocutions and preliminary hearing testimony), which were submerged in murk before.
4. An effect that is harder to characterize: Doing away with *Roberts* leaves no constitutional standard for unreliable hearsay. It is not yet entirely clear what courts will do with cases like *Idaho v. Wright* if they arise today. The problem in cases like *Wright* is that some apparently nontestimonial hearsay might be crucial in a case, and there is essentially no constitutional standard to apply.
5. Commentators speak of a "due process" standard of reliability, but it seems probable that Due Process will speak more to the *procedures* for admitting and testing proof, and perhaps to the overall adequacy of proof (its sufficiency to convict) than to the reliability of hearsay. Particularly if *all* private party statements are nontestimonial, arguably this result is troubling.

End

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